PRIVY COUNCIL REPORT

TEOH CHAI SIOK v. DIRECTOR GENERAL OF INLAND REVENUE

[P.C. (Lord Edmund Davies, Lord Russell of Killowen, Lord Keith of Kinkel, Lord Bridge of Harwick & Sir John Megaw) February 10 & 11, 1981]

[Privy Council Appeal No. 27 of 1978]

Revenue Law — Income Tax — Purchase and sale of land — Whether adventure or concern in the nature of trade — Liability to tax — Income Tax Act, 1967, s. 4(a).

In this case the appellant had purchased land in Alor Star, Kedah, and after obtaining the permission of the Government to alter the conditions in the land title from agricultural purposes to one of erecting dwelling houses he sold the land at a profit. He was assessed to tax on the profit and his appeals to the Special Commissioners and to the High Court ([1977] 1 M.L.J. 34) were dismissed. A further appeal to the Federal Court was dismissed ([1977] 2 M.L.J. 212) and the appellant appealed.

Held, the Special Commissioners, the High Court and the Federal Court were right in holding that the transaction, although an isolated one, was an adventure or concern in the nature of trade.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Raj Kumar Sharma for the appellants.

Stewart Bates Q.C. (*Steven Allcock* with him) for the respondents.

Cur. Adv. Vult.

Lord Edmund-Davies (delivering the oral judgment of the Board): This is an appeal from a judgment of the Federal Court of Malaysia. The matter started with an additional assessment of income tax for the year of assessment, 1974, made against the appellant. He appealed to the Special Commissioners against that assessment and the appeal was dismissed.

The appellant then proceeded by way of case stated to appeal to the High Court in Malaya and the question of law for the opinion of the court was whether, on the evidence before the Commissioners, they were entitled to hold that an isolated transaction, the nature of which need not now be gone into, was an adventure or concern in the nature of trade. Were that so, any profits or gains derived therefrom would admittedly be assessable to income tax. The learned judge in the High Court dismissed the appeal and in due course the appellant appealed to the Federal Court, who on June 25, 1977 again dismissed the appeal.

Having heard learned counsel for the appellant urge all that could properly be said on behalf of his client, their Lordships have not found it necessary to call upon learned counsel for the respondent. So convinced are their Lordships regarding the proper outcome, indeed the inevitable outcome, of this appeal that they propose neither to reserve judgment nor to say more than that they are in respectful agreement with the decision arrived at by the Federal Court and for the reasons which appear in their judgment.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed and that the appellant should pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Gasters; Stephenson Harwood.*

SINGAPORE REPORTS

SYN MIN KONG SDN. BHD. & ORS. v. HUA SENG SAWMILL CO. BHD.

[C.A. (Kulasekaram, Chua & Rajah JJ.) October 7, 1980]

[Singapore — Civil Appeal No. 39 of 1980]

Practice and Procedure — Writ — Service out of jurisdiction — Failure to serve within 12 months — Extension of time — Discretion of court — R.S.C. 1970, O. 6 r. 7(2).

The appellants applied and obtained an order to issue a writ of summons, notice of which was to be served out of jurisdiction upon the respondents at Sibu, Sarawak. A request for service of the Notice of the Writ of Summons on the respondents was made by the appellants on July 17, 1979. On July 24, 1979 the Singapore High Court forwarded the necessary documents for service to the Permanent Secretary (Foreign Affairs, Singapore) in order that the service would be effected on the respondents through the judicial authorities in Malaysia. On November 30, 1979 the appellants applied by summons-in-chambers to the Registrar to renew the writ for a further period of twelve months. The summons came on for hearing before the Registrar on January 28, 1980. In the meantime the Notice of the Writ was served on the respondents on December 17, 1979, after the expiry of the writ. The respondents entered conditional appearance on January 4, 1980 and at the hearing before the Registrar the respondents opposed the application of the appellants. The Registrar made an order extending the validity of the writ for further period of twelve months from December 4, 1979. The respondents appealed and the learned Chief Justice allowed the appeal. On appeal by the appellants to the Court of Appeal.

Held, allowing the appeal: (1) the rules governing the extension of time are contained in R.S.C. 1970 Order 6 rule 7(2). In seeing whether the discretion should be exercised under that rule it must be remembered that at the time of the hearing of the application to renew the writ the cause of action to which the writ relates had become time-barred. The appellants in this case had one year to issue their writ. If they had issued it within that one year, they have another twelve months within which they could serve the writ. If they require to extend it for a further time before service, they ought to show sufficient reason for an extension of time;

(2) in this case it was not unreasonable for the appellants in all the circumstances to wait till July 17, 1979 to request for the service of the notice of the writ. The appellants could not have anticipated that the documents which had been despatched by the Singapore High Commissioner in Kuala Lumpur to the Malaysian Ministry of Foreign Affairs in Kuala Lumpur would take 3 months to reach the Registry of the High Court in Kuching and that it would take approximately a further five weeks for service to be effected on the respondents in Sibu. Service in this case could not have been effected by the appellants themselves. It had to be done through proper channels by the court in Kuching. They did all what they could and they could not be said to have been negligent at all.

Cases referred to:-

(1) *Battersby* v. *Anglo-American Oil Co. Ltd.* [1945] K.B. 23.

(2) *Heaven* v. *Road and Rail Wagons Ltd.* [1965] 2 All E.R. 409.

(3) *The "Nimrod"* [1973] 2 Ll. R. 91.

COURT OF APPEAL.

Denis Murphy for the appellants.

K. Jaya Prakash for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): At the end of the hearing of the appeal we allowed the appeal and said that we would give our reasons in writing at a later date. We do so now.

The appellants applied and obtained an order on December 4, 1978, to issue a writ of summons, notice of which was to be served out of jurisdiction upon

the respondents at Sibu, Sarawak. A writ of summons was issued by the appellants against the respondents on December 4, 1978. The appellants were seeking compensation from the respondents, the owners of the vessel "BRUAS", in respect of damages to cargoes shipped on board the "BRUAS" for carriage from Kuching to Singapore. On December 5, 1977, the vessel "BRUAS" ran aground at Tanjong Datu *en route* to Singapore.

The appellants also commenced admiralty *in rem* proceedings against the vessel "BRUAS" in Admiralty in Rem No. 610 of 1978.

A request for service of the notice of the writ of summons in this action on the respondents in Sibu, Sarawak, was made by the appellants on July 17, 1979. On July 24, 1979, the Singapore High Court forwarded the necessary documents for service to the Permanent Secretary (Foreign Affairs, Singapore) in order that service would be effected on the respondents through the judicial authorities in Malaysia.

On November 30, 1979, the appellants applied by summons-in-chambers to the Registrar to renew the writ for a further period of twelve months. The summons came on for hearing before the Registrar on January 28, 1980. In the meantime the notice of the writ was served on the respondents on December 17, 1979, after the expiry of the writ. The respondents entered conditional appearance on January 4, 1980. At the hearing before the Registrar the respondents opposed the application of the appellants. The Registrar made an order extending the validity of the writ for a further period of twelve months from December 4, 1979. The respondents appealed and by a judgment dated March 10, 1980, the learned Chief Justice allowed the appeal. Now there is an appeal from the learned Chief Justice's decision to this court.

The rules governing the extension of time are contained in R.S.C. Order 6 rule 7(2) which says:

"Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow."

In seeing whether the discretion should be exercised under that rule we must remember that at the time of the hearing of the application to renew the writ the cause of action to which the writ relates had become time-barred. The appellants in this case have one year to issue their writ. If they issue it within that one year, they have another twelve months within which they can serve the writ. If they require to extend it for a further time before service, they ought to show sufficient reason for an extension of time. That follows from what Lord Goddard said in *Battersby* v. *Anglo-American Oil Co., Ltd.*,[1] and from what Megaw J. said in *Heaven* v. *Road and Rail Wagons, Ltd.*[2]

In *Battersby's* case Lord Goddard, delivering the judgment of the court, said at page 32:

"We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order."

The appellants' reason for refraining from requesting the service of the notice of the writ from December 1978, until July 1979, was that it was hoped that the admiralty *in rem* action which had been started might be served on the vessel in Singapore should the vessel put in at Singapore in which case it would not be necessary to serve the writ outside the jurisdiction. The writ *in rem* has not yet been served to date as the vessel has not, since the date the cause of action arose, come within the jurisdiction, the vessel having been laid up in the respondents' wharf at Sibu. A renewal of the writ *in rem* has been obtained and will expire on October 3, 1980. As the vessel is unlikely to call at Singapore the appellants have found it advisable and necessary to proceed *in personam* in this suit and they applied on July 17, 1979, to have the notice of the writ sent to the proper authorities for service on the respondents in Sibu, Sarawak.

After the hearing before the learned Chief Justice, the appellants made inquiries to ascertain how the delay in serving the notice of the writ occurred. The relevant documents were sent by the Foreign Ministry, Singapore, on July 31, 1979, to the Singapore High Commissioner in Kuala Lumpur and on August 1 they were sent by the Singapore High Commissioner in Kuala Lumpur to the Ministry of Foreign Affairs, Malaysia. The Senior Assistant Registrar of the High Court in Kuching received them on November 5, 1979, they having been sent from the High Court Registry, Kuala Lumpur, on November 2, 1979. Service was effected on the respondents on December 17, 1979.

The respondents contend that it was the duty of the appellants to take steps to have the notice of the writ served as soon as the writ was issued and that it was not a good reason for the appellants to say the delay in taking the steps was because the appellants were waiting for the vessel to come within the jurisdiction in order to arrest the same in another suit though relating to the same subject-matter.

In our view it was not unreasonable for the appellants in all the circumstances to wait till July 17, 1979, to request for the service of the notice of the writ. Plenty of time had been given from July 17 to December 2 within which to obtain service. How could the appellants have anticipated that the documents which had been despatched by the Singapore High Commissioner in Kuala Lumpur to the Malaysian Ministry of Foreign Affairs in Kuala Lumpur would take 3 months, an unexpectedly long period, to reach the Registry of the High Court in Kuching and that it would take approximately a further five weeks for service to be effected on the respondents in Sibu? This is not a case where service could have been effected by the appellants themselves. It had to be done through proper channels by the court

in Kuching. The appellant did not go to sleep. They did what they could and they wrote to the Registrar, High Court, Singapore, requesting for information regarding the outcome of the service on August 15, 1979, September 2, 1979, October 2, 1979 and October 15, 1979. This is not a case like *The "NIMROD"*(3) (which is relied on by the respondents both before the learned Chief Justice and this court) where the court decided that a judge should not lend assistance to plaintiffs who had negligently left the service of the writ until the last minute. The appellants cannot be said to have been negligent at all.

For these reasons we allowed the appeal.

Appeal allowed.

Solicitors: *Godwin & Co.; Drew & Napier.*

TAN KAI MEE v. LIM SOEI JIN

[A.C.J. (Sinnathuray J.) September 24, 1980]
[Singapore — District Court Appeal No. 88 of 1979]

Family Law — Husband and wife — Maintenance — Deed of separation — Clause "wife shall not at any time apply to court to vary the maintenance order" — Bad in law and against public policy — Women's Charter (Cap. 47).

One of the grounds of appeal in this case was that the learned Magistrate should have given effect to a clause in the Deed of Separation which provided that the respondent/wife shall not at any time apply to the courts to vary the maintenance order.

Held: the clause was bad in law because it was not within the province of the parties to contract out of the Women's Charter. It was also bad in law because such a clause would be contrary to public policy, for the parties to contract to oust the jurisdiction of the courts.

DISTRICT COURT APPEAL.

Appellant in person.

Mohamed Harith Kassim (Assistant Director of Legal Aid) for the respondent.

Sinnathuray J. (delivering oral judgment): There is nothing in this appeal. All the facts were before the learned Magistrate. I have heard the appellant this morning. He gave me his income and his expenses. His statement confirms that the learned Magistrate was right when he ordered the maintenance order to be varied from $200 to $400 a month.

There is one other ground of appeal. It is that the learned Magistrate should have given effect to a clause in the Deed of Separation which clause provides that the respondent, wife, shall not at any time apply to the courts to vary the maintenance order. As was submitted by Mr. Kassim for the respondent that clause is bad in law because it is not within the province of the parties to contract out of the Women's Charter. It is also bad in law because such a clause would be contrary to public policy, for the parties to contract to oust the jurisdiction of the courts. So then, that ground also fails. For these reasons, the appeal must be dismissed.

Appeal dismissed.

TAN CHAI HENG v. YEO SENG CHOON

[O.C.J. (Choor Singh J.) September 30, 1980]
[Singapore — Motion in Originating Summons No. 239 of 1980]

Practice and Procedure — Appeal — Notice — Extension of time for filing — Solicitor's file mislaid.

Legal Profession — Failure to serve Notice of Appeal in time — Duty of solicitor to exercise reasonable diligence.

The Originating Summons was heard before the Honourable the Chief Justice on July 18, 1980 who dismissed it with costs. The last day for filing the Notice of Appeal was August 18, 1980. No Notice of Appeal was filed on that date. On August 29, 1980 an application was made to the court for extension of the time prescribed for filing the Notice of Appeal. The reason for the failure to file the Notice of Appeal in time was contained in the affidavit of the appellant's solicitor as follows:—

> "...The Notice of Appeal was prepared on the 18th day of July 1980. However the cause paper file pertaining to this matter was misplaced in my office library which was then undergoing renovations. Hence the said Notice of Appeal was not filed in Court. It was only on the 20th day of August 1980 in the afternoon after an exhaustive search that I discovered the file.
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> Upon an inspection of the file, I noticed that the Notice of Appeal was not filed in Court. I immediately instructed my Clerk to file the same, but the same was rejected by the Registry of this Honourable Court as the last day for filing the Notice of Appeal expired on 18th August 1980."

Held: the facts disclosed in the affidavit showed gross negligence on the part of the appellant's solicitor and did not merit the exercise of judicial discretion in favour of the applicant.

Case referred to:

(1) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228; [1964] 3 All E.R. 933.

MOTION.

Venu Gopal for the applicant.

Peter Tio Pee Tat for the respondent.

Choor Singh J.: This Originating Summons was heard before the Honourable the Chief Justice on July 18, 1980 when it was dismissed with costs. The last day for filing the notice of appeal was August 18, 1980. No notice of appeal was filed by that date.

On August 29, 1980 an application was made before me for an extension of the time prescribed for the filing of the notice of appeal. The reason for the failure to file the notice of appeal in time is stated in the affidavit of the appellant's solicitor filed in support of the application, as follows: —

> "...The Notice of Appeal was prepared on the 18th day of July 1980. However the cause paper file pertaining to this matter was misplaced in my office library which was then undergoing renovations. Hence the said Notice of Appeal was not filed in court. It was only on the 20th day of August 1980 in the afternoon after an exhaustive search that I discovered the file.
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> Upon an inspection of the file, I noticed that the Notice of Appeal was not filed in court. I immediately instructed my clerk to file the same, but the same was rejected by the Registry of this Honourable Court as the last day for filing the Notice of Appeal expired on 18th August 1980."

In my view the facts disclosed in the affidavit indicate that neither the solicitor nor his clerk used sufficient diligence to ensure the appeal being brought in time.